

REMARKS

Entry of this Amendment is proper under 37 C.F.R. § 1.116, because the Amendment places the application in condition for allowance for the reasons discussed herein; does not raise any new issue requiring further search and/or consideration, because the amendments amplify issues previously discussed throughout prosecution; and places the application in better form for an appeal should an appeal be necessary. Entry of the Amendment, reexamination and further and favorable reconsideration of the subject application in light of the following remarks, pursuant to and consistent with 37 C.F.R. § 1.116, are thus respectfully requested.

1. Status of the Claims

As noted in the Office Action Summary, claims 13 and 15-35 stand pending. Claims 13 and 15-35 stand rejected.

After entry of the above amendments, claims 13 and 26 are amended; claims 17, 23-25, and 31 are canceled; and no claim is added. Thus, claims 13, 15, 16, 18-22, 26-30, and 32-35 are now pending.

Support for the foregoing amendments can be found, for example, in at least the following locations in the original disclosure: the original claims and the specification, page 11, lines 23-24.

3. Rejection of the Claims Under 35 U.S.C. § 103

Claims 13, 15-16, 18-30, and 32-35 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over CN 1237624 to Liu (hereafter "*Liu*") in view of Tarkmishvili et al., Novel Foaming Agent, Khlebopekarnaya i Konditerskaya Promyshlennost (1972) (hereafter "*Tarkmishvili*"). Claims 17 and 31 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over *Liu* in view of CN 1237624 in view of *Tarkmishvili* as applied to claims 16 and 26 above, and further in view of CN 1285153 to Gong Yungao (hereafter "*Gong Yungao*").

Applicants respectfully traverse these rejections. Claims 13 and 26 each recite "wherein the drink comprises a hop extract" as originally recited in claims 17 and 31. The Office admits that *Liu* and *Tarkmishvili* fail to disclose a hop extract. *See, e.g.*, p. 7 of the Office Action dated

January 27, 2009. The current rejections of the independent claims are thus moot. However, claims 17 and 31 were rejected over the combination of *Liu*, *Tarkmishvili*, and *Gong Yungao* for the reasons presented at page 7 of the Office Action dated January 27, 2009. Thus, this latter rejection will be discussed below with regard to its applicability to amended claims 13 and 26.

The Office admits that *Liu* and *Tarkmishvili* fail to disclose a hop extract, but the Office alleges that *Gong Yungao* discloses a medically healthy tea beverage that includes hops. The Office further alleges that it would have been obvious to include hops in tea beverages for the benefits taught in *Gong Yungao*.

Applicants respectfully traverse the rejection. Whether a claim is obvious is based on an objective analysis of the scope and content of the prior art, the differences between the prior art and each element of the claimed invention, and the level of skill in the pertinent art. *See Graham v. John Deere Co.*, 383 U.S. 1, 15-17 (1966). In determining the differences between the prior art and the claims, the question is not whether each individual difference would have been obvious, but whether the claimed invention as a whole would have been obvious. *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 218 U.S.P.Q. 871 (Fed. Cir. 1983); MPEP § 2141.02.

Differences between the prior art and the claims

The Office has attempted to combine three references each of which discusses distinct goals under a piece-meal analysis of the differences between the prior art and the claims. The Office begins with *Liu*, which the Office admits fails to disclose hop extract or foam-holding properties of the drink in relation to an identical drink not containing tea leaf extract as recited in the claims. *See, e.g.*, p. 4 and 7 of the Office Action Dated January 27, 2009. Additionally, the foam holding properties of the drink recited in the claims are not necessarily present in the drink of *Liu*, at least because depending on the particular foaming agent and hop extract used and the concentrations of carbon dioxide, hops, foaming agent, and tea leaf extract, the tea would not necessarily act as a foam holding agent. The Office has further admitted that *Tarkmishvili* is relied upon for the foam-holding properties of the drink, at least because *Liu* fails to disclose the properties. *See, e.g.*, p.6 of the Office Action dated August 13, 2009.

As stated above, *Tarkmishvili* is relied upon by the Office for allegedly disclosing that tea leaf extract is a foam-holding agent. However, *Tarkmishvili* fails to disclose that tea leaf extract is a foam-holding agent in a carbon dioxide containing drink. Instead, *Tarkmishvili* discloses that tea extract can replace egg whites as a foam-producing agent in the formation of soufflé. The Office has provided no evidence that tea leaf extract when combined with a foam-producing agent acts as a foam-holding agent, wherein foam-holding includes the ability to retain a level of foam for an extended time period. Further, Applicants note that the foaming properties of soufflé and a carbon dioxide containing drink are quite different. The Office has provided no evidence that a material known to produce foam in soufflé would act as a foam-holding agent in a carbon dioxide containing drink. Therefore, the Office has provided no evidence that it would have been expected or predictable to add tea leaf extract to a carbon dioxide containing drink in an amount in relation to other components of the drink to produce a drink having an ability to hold a foam layer for a longer period as compared to a comparative drink not containing tea leaf extract.

The Office has further relied on *Gong Yungao* for its disclosure of a hop extract in a tea drink to improve taste. However, *Gong Yungao* fails to disclose forming a carbon dioxide containing drink with tea extract. *Gong Yungao* also fails to include foaming agents, and thus is not related to “foam” drinks. *Gong Yungao* further fails to disclose whether hop extract would improve the taste of a drink formed from the components of the claimed drink. Given that the Office has provided no evidence to whether hop extract would affect the foam retention abilities of a drink, there is no rational to apply the teachings of *Gong Yungao*. The only evidence provided by the Office regarding additions of hop extract is *Gong Yungao*, which fails to disclose a drink having carbon dioxide or foaming agents and that does not foam.

Predictability of the results of a combination are required to combine references

The mere fact that references can be combined or modified does not render the resultant combination obvious unless the results would have been predictable to one of ordinary skill in the art. *KSR Int’l Co. v. Teleflex, Inc.*, 82 U.S.P.Q.2d 1385, 1396 (2007). The Office’s objective analysis of obviousness should be made explicit. *See KSR Int’l Co. v. Teleflex, Inc.*, 82

U.S.P.Q.2d 1385, 1396 (2007). The MPEP provides exemplary rationales that may support a conclusion of obviousness. *See* MPEP § 2143. In each of the exemplary rationales, the Office must articulate that the results of the combination or modification were predictable. However, as shown above the Office has provided no evidence showing that a foam producing drink containing carbon dioxide, foaming agent, tea leaf extract, and hop extract would have the ability to hold a foam layer for a longer period as compared with a comparative drink which is identical to the former excepting that the latter does not comprise a tea leaf extract.

The ultimate determination of patentability is based on the entire record, by a preponderance of evidence, with due consideration to the persuasiveness of any arguments and any secondary evidence. *In re Oetiker*, 977 F.2d 1443, 24 U.S.P.Q.2d 1443 (Fed. Cir. 1992). In contrast, to the lack of evidence by the Office described above, Applicants submit evidence in the form of experimental data showing the unpredictability and surprising improvement in foam holding properties for a carbon dioxide and hop extract containing drink when a tea leaf extract is added. For example, Table 1 on page 15 of the Specification provides foam retention levels for different samples containing one or more of a black tea extract, a hop-derived component, or a *Quillaja saponaria*-derived component as a foaming agent.

The results of sample 6 compared to sample 8, and a comparison between samples 4 and 7 show that containing the hop extract will result in an inferior foam-holding property. In contrast, when black tea extract is present in the drink, the negative affects of the hop extract are less pronounced or eliminated. This is shown by a comparison between samples 2 and 5 and a comparison between samples 1 and 4. Further, a comparison of samples 1, 2, 4, and 6, which are all of the samples including hop extract, shows that containing both a tea extract and *Quillaja saponaria*-derived component in a drink improves the deteriorating affects of the hop extract the most.

In summary, the results of Table 1 show that the expected foam-holding property from a carbon-containing drink with a foaming agent is not achieved if a hop extract is added to the drink. For example, compare samples 4 and 7. However, surprisingly, adding the tea extract will bring the foam-holding property to the expected level by countering the deteriorating affects of the hop extract. For example, compare samples 1 and 7.

In addition to the surprising improvement in foam retention, Table 3 of the Specification shows surprising results of a sensory test when foaming agent, tea extract, and hop extract are added to a carbon dioxide containing drink. During a sensory test, panelists scored samples based on their effervescent quality in the mouth and texture on the throat. *See, e.g.*, p. 17, ll. 14-21 of the Specification. Samples 6, 4, 3, and 5 each include only a tea extract or hop extract, and the scores range between 10.4 and 9.5 depending on whether the foaming agent was added and which extract was used. *See, e.g.*, p. 18, Table 3. In contrast, samples 1 and 2, which included both tea extract and hop extract with or without foaming agent, had scores of 12.8 and 12.2, respectively. The results show that the effect brought by the combination use of a tea extract and a hop extract is significantly higher than the sole use of the tea extract or the hop extract. This synergy effect is not disclosed in the prior art references, and would not have been expected based on any combination of the references.

Therefore, when the evidence of unpredictability provided above is weighed against the lack of evidence of predictability provided by the Office it is clear that no *prima facie* case of obviousness has been established. Dependent claims 15-16, 18-22, 27-30, and 32-35, which depend from claims 13 or 26, respectively, are also not obvious for at least the same reasons as discussed above. Therefore, Applicant's respectfully request withdrawal of the rejections.

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CONCLUSION

Reconsideration and reexamination of the claims is respectfully requested. If there are any other fees due in connection with the filing of this response, please charge the fees to our Deposit Account No. 50-0573. If a fee is required for an extension of time under 37 C.F.R. § 1.136 not accounted for above, such an extension is respectfully requested and the fee should also be charged to our Deposit Account including an appeal fee and Notice of Appeal should it be necessary to maintain pendency of the application. If any issues remain outstanding, the Examiner is invited to contact the undersigned.

Respectfully submitted,
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